No. 14,413

IN THE

United States Court of Appeals

For the Ninth Circuit

CHARLES TESSEYMAN,
Appellant,

vs.

JOHN W. FISHER, LURENE W. FISHER, and UNITED STATES OF AMERICA,
Appellees.

Appeal from the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEES JOHN W. FISHER AND LURENE W. FISHER.

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OPENING STATEMENT.

This Court can take judicial notice of the opinions rendered by the District Court of Appeal of California in *Fisher v. Nash Building Company,* 113 CA 2d 397 and *Tesseyman v. Fisher,* 113 CA 2d 404. (When reference is made to these two decisions it will be by the page number in the bound volumes of the opinions of the District Court of Appeal.)

In *Atlantic Fruit Co. v. Red Cross,* 5 Fed. Rep. 2d 218 the Circuit Court of Appeals said:

> (1) That we may take cognizance without plea or proof of the judicial opinions of any state in the Union is undoubted (Vagaszki v. Consoliration Coal Co., 445 F. 913, 141 C.C.A. 37), and a fortiori is this true of the opinions of United States Courts.
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> * * * * * * *
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> . . . We think it clear, however, that it is permissible to examine the record resulting in an opinion, to ascertain the grounds upon which the opinion is based. This does not imply acceptance as proven facts, of what the Court writing the opinion so regarded.

From these records it appears that on March 23, 1949 the Fishers, husband and wife, agreed to sell the Motel Inn to the Nash Building Co. for $155,000. This proposed sale was evidenced by escrow instructions deposited with a title company to whom the Fishers delivered the deed and bill of sale of the personal property (page 398). Subsequently, on April 11, 1949, amended escrow instructions were filed and Tesseyman was let into possession. Tesseyman, in writing, approved both of these escrows. On March 31, 1950, approximately a year after the original escrow, the Fishers made demand on the Nash Building Co. and Tesseyman to complete the terms of the sale, by paying the balance of the purchase price, which they failed to do. Tesseyman thereupon filed the action of *Tesseyman v. Fisher,* #17745 in the State Superior Court, in which he disowned the escrow instructions and claimed an oral agreement under the

terms of which Fisher and the Nash Building Co. agreed to trade the Motel Inn for a hotel owned by Tesseyman in San Francisco. Thereafter Fisher filed action #17780 against the Nash Bulding Co. for the balance of the purchase price, joining Tesseyman, and claiming that any rights which he might have were subordinate to Fisher's rights. In the Fisher action a *les pendens* was filed. Approximately a week later the United States government filed an income tax lien for income tax owed by Tesseyman. The government never intervened in the pending litigation between the Fishers and the Nash Building Company and Tesseyman, but sat idly by. Both State Court actions went to trial, and a judgment was rendered in action #17780 in favor of the Fishers and against the Nash Building Company for the balance of the purchase price, the Court holding that any rights Tesseyman might have were subordinate to the Fishers' rights. In the Tesseyman suit #17745, to have the transaction declared a trade, the Court held that the evidence did not support such contention and rendered judgment against Tesseyman. Both cases were appealed and were affirmed in the decisions referred to, the Courts holding that Tesseyman had no right, title or interest in either the real or personal property agreed to be sold by Fisher to the Nash Building Co.

When Tesseyman in the state Court proceedings appealed he did not put up a stay bond, and Fisher caused the sheriff of San Luis Obispo County to sell this real and personal property, and bought it in for the balance of the purchase price. After a year

expired, during which redemption might be had, he secured a sheriff's deed.

It will be noted that title never passed out of the Fishers' for the deeds and bills of sale remained in escrow and were never delivered to the purchaser, for the reason that the escrow was never fulfilled. It will likewise be noted that the government's claimed lien against this real and personal property could only attach to any interest which Tesseyman might have in the property, and the State Courts held that he had no right, title or interest. Nevertheless, the government refused to release its tax lien of record, with the result that Fisher filed this action against the United States of America to quiet title against the tax lien which they were asserting against Tesseyman's interest in this property, which the state Courts had declared non-existent. It further appears from the transcript in the government's appeal that the federal district judge decided in favor of the Fishers and quieted title, and the government then appealed. The government, at the trial before Judge Tolin, called Mr. Tesseyman as a witness, and he was sworn and took the stand. It was after the government's case had been submitted and immediately prior to the decision that Tesseyman filed his intervention motion, and as stated in the footnote on page 9 of the appellant's brief, the judge stated from the bench that it was denied on the ground that the request for intervention was not made timely.

Interpreting Rule 24 of the Federal Rules of Procedure, the Court in *Kaufmann v. Society Interna-*

tionale, 188 Fed. 2d 1017 held that the intervenor must have "a legal interest in the property in the custody of the Court."

Appellant recognizes this rule for he states (Brief, p. 13):

> That he sought leave to intervene "on the ground that he is the owner of a legal and equitable right, estate, interest and claim in and to the real property involved in the litigation . . ."

PART I.

THE QUESTION OF LACK OF JURISDICTION OF THE SUBJECT MATTER.

A judgment obtained by fraud and collusion is not null and void but merely voidable, and will be treated separately. In Part One we will confine ourselves to the claim of lack of jurisdiction of the subject matter.

A.

THE STATE COURT HAD JURISDICTION TO ENTERTAIN THE SEPARATE ACTION FILED BY FISHER (NO. 17,780) TO COLLECT THE BALANCE OF THE PURCHASE PRICE.

This subject is discussed at pages 24 and 25 of appellant's brief, but no authorities are cited. The question of whether Fisher should have been compelled to cross-complain in the prior action brought by Tesseyman, or whether he could file an independent action to recover the balance of the purchase price, raises a procedural, rather than a jurisdictional

question, and the general rule is that it is discretionary with the trial Court. The head note of Section 69 under equity found in 30 C.J.S. 422 reads:

> "A chancery court may retain jurisdiction of a case of original equitable cognizance to afford legal relief; but retention for such purpose is matter of discretion rather than of right and will ordinarily be denied where the legal relief is not germane to the equities involved."

Tesseyman made the contention in the state Court that it was mandatory that the two actions be tried together for the reason that the Court in his action (No. 17745) was a Court in equity and had exclusive jurisdiction. At page 402 the Court states his contention:

> (a) . . . Tesseyman's argument appears to be that since a court of equity had obtained jurisdiction first over action 17745, and since the pleadings in that action were adopted and made a part of the pleadings in the present action, and vice versa, consolidation was a matter of right.

This claim was disposed of by the Appellate Court by holding that consolidation laid solely within the sound discretion of the trial Court and that there had been no abuse of the discretion; it thus applied the same principle as heretofore set forth in the quotation from *Corpus Juris Secundum,* the Court saying:

> (b) . . . Consolidation is not a matter of right; it rests solely within the sound discretion of the trial judge, and his decision to consolidate, or his refusal to do so, will not be reviewed except upon a clear showing of abuse of discretion.

(*Realty etc. Mtg. Co. v. Superior Court,* 165 Cal. 543, 546, (132 P. 1048).) Tesseyman makes no showing of either an abuse of discretion or of prejudice resulting from the court's determination to keep the two actions separate; nor can he do so in view of the record in both actions.

(c) . . . The issues which Tesseyman endeavored to inject into the present case by his pleadings, his offer of proof, and motion to consolidate were subsequently tried in action 17745, and there determined against him, which determination has this day been affirmed by this court. Since the result would have been the same had the two actions been consolidated, he clearly suffered no prejudice.

There is no merit in Tesseyman's contention that the court erred in refusing his offers of proof. The court had determined to keep separate the issues involved in the two actions.

There is therefore, no merit in Tesseyman's claim that the Court lacked jurisdiction to entertain the Fisher action, because Tesseyman had filed a prior action.

B.

THE STATE COURT HAD JURISDICTION TO ENTERTAIN AN ACTION PRAYING FOR THE ESTABLISHMENT OF A LIEN ON BOTH REAL AND PERSONAL PROPERTY AND DECREEING A SALE OF BOTH REAL AND PERSONAL PROPERTY FOR A LUMP SUM.

Appellant's contention is found at page 23. This same issue was raised in the state Courts and decided

adversely to Tesseyman. At page 402 the Court in itemizing Tesseyman's points states that one of them appears to be that "the Court should not have decreed a lien on the personal property". The Appellate Court pointed out that the principal issue in the Fisher case was whether the plaintiffs as sellers were entitled to recover from the Nash Building Company the balance of the purchase price and (403) "whether Tesseyman's interest in the property was paramount to plaintiff's". At 403 the Court says: "He [Tesseyman] concedes that the evidence offered by him related to events which occurred prior to the escrow instructions that in no way could affect plaintiff". In other words, the Court held that the question of whether both the real and personal property were subject to the same lien and could be sold for a lump sum were issues between Fisher and the Nash Building Co. and not an issue between Fisher and a third party (Tesseyman), who claimed some rights in the property, but which rights were subordinate to Fisher's.

Because it is doubtful whether the Court can take judicial notice of the contents of the briefs which were filed in the State Court actions, we will briefly refer to the authorities cited in Fisher's brief on this same question.

Fisher pointed out that all the authorities relied on by Tesseyman (and they are the same as found on page 23 of his present brief) referred to implied vendors liens where title had passed to the vendee, and did not apply to cases where vendor retained

title to both the real and personal property as security for the purchase price. Fisher quoted at length from *Sparks v. Hess,* 15 Cal. 186, where the California Courts went extensively into this problem. Fisher also pointed out the Tesseyman quotations from 88 ALR 92, which is the same as found in the present brief, failed to note an exception to the general rule, which reads as follows:

> "Where, on a combined sale of realty and personalty, no deed has been executed but title is reserved by the vendor until payment of the purchase price, it would seem that the parties must have intended to reserve the title as security not merely for such part of the purchase price as could be attributed to the realty, but for the full purchase price. At least, this seems to be the view adopted by the courts."

Fisher also pointed out that the doctrine of this earlier ALR note was confirmed in 152 ALR 16 where the following language was used:

> "Where a contract for the sale of property includes both realty and tangible personalty, the jurisdiction to grant specific performance of the contract as to the realty may carry with it the right to grant similar relief as to the personalty, at the instance of either the vendor or the vendee, even though the contract as to the personalty might not, independently, be a proper subject for such relief."

It thus appears that the issue now raised, that is, whether the real and personal property could be sold as a unit for a lump sum, was at issue in the State

Court actions and was supported by the weight of authority, including California.

PART II.

THE CLAIM THAT THE JUDGMENT IN THE FISHER ACTION WAS OBTAINED BY FRAUD.

Fisher, relying upon the judgment which he obtained in the state Court, used it as a basis of a quiet title action against the United States of America, which was asserting an income tax lien against Tesseyman who, according to the state Courts' judgments, had no interest in this property.

Tesseyman's attempted interventions in this action between Fisher and the government is a collateral attack:

> "As a general rule, an attack upon a judgment is regarded as collateral if made when the judgment is offered as the basis of the opponent's claim. This rule has been applied where the attack is made upon a judgment offered in evidence in a subsequent action or proceeding, as, for example, where the judgment is offered in support of a title, or as a foundation for the application of the doctrine of res judicata. (31 Am. Jur. p. 204.)"

Directly applicable to the present situation is the language found at 31 Am. Jur. page 207:

> "Similarly, an attempt, in a suit to quiet title, to attack a judgment affecting the property has

> been regarded as a collateral attack upon the judgment, even though the petition contained a prayer that the judgment be vacated."

The intervention charged that the judgment in the Fisher case was obtained by collusion between Fisher and Tesseyman's co-defendants and their counsel. 49 C.J.S. at 861 reads:

> "A party or privy to a judgment ordinarily is not permitted to impeach it collaterally on the ground that it was obtained by means of collusion between the other parties to the action or the attorneys in the case, although, as considered supra Sec. 414, this may be done by a stranger to the proceeding, when his rights or interests in a subsequent litigation are threatened by the judgment."

Since this is a collateral attack on a judgment—for the reason that Fisher offered in a proceeding against the United States Government in support of a title, and since a judgment may not be impeached collaterally by any person who is a party or privy to the judgment—the judgment is valid and not subject to collateral attack by Tesseyman.

However, in addition, assuming that it was a direct attack, the type of extrinsic fraud which permits an equitable attack upon a judgment must be that type of fraud which prevents a litigant from having his day in Court and presenting his side of the controversy.

No lengthy reference to authorities is necessary because this question is exhaustively treated in *Pico*

v. Cohn, 91 Cal. 129, and *Throckmorton v. United States,* 98 U.S. 61, where the Supreme Court of the United States defines what constitutes extrinsic fraud; 25 Law. Ed. 93 at 95:

> "But there is an admitted exception to this general rule, in cases where, by reason of something done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. See, Wells, *Res Adjudicata,* Sec. 499; *Pearce v. Olney,* 20 Conn., 544; *Wierich v. DeZoya,* 7 Ill., (2 Gilm.) 385; *Kent v. Ricards,* 3 Md. Ch., 396; *Smith v. Lowry,* 1 Johns. Ch., 320; *De Louis v. Meek,* 2 Green (Iowa), 55."

It thus appears that the type of fraud which justifies an attack in equity on the validity of the judgment—is extrinsic fraud, which prevented an adversary trial.

An examination of the intervention motion and the proposed answer conclusively demonstrates that no actionable fraud could possibly exist.

The intervention motion contains a summarization of the claim of fraud—Tr. pp. 19-20:

> ". . . and, also, to have been procured by said plaintiffs through collusion and connivance with the Nash Building Company, Inc., and George H. Jovick, defendants in said state court action, and their attorney Courtney L. Moore, . . ."

When we turn to the proposed answer for an elaboration of these charges, the answer proves that no extrinsic fraud existed which could be the basis of an attack.

Tesseyman alleges that in the Fisher action he filed an Answer (Tr. p. 26) which Answer is Exhibit B (Tr. p. 44-51). The answer thus filed in the Fisher case sets up the identical issues now being urged before this Court, namely, that it was a trade and not a sale. The Appellate Court points out that as a part of his answer in the Fisher case Tesseyman adopted "insofar as the allegations in the complaint . . . are applicable to the defense of this answering defendant", the allegations in the earlier action (113 CA 2d 397 at 399). Tesseyman further admits and affirmatively alleges that he was present at the trial of the Fisher case, but was not permitted to introduce evidence. The record in the Appellate Court shows that he testified (113 CA 2d 400). We thus have presented a case where the defendant formally appeared and answered, set up all his defenses and took the

witness stand. In his claim of fraud he forgets that the very defenses which he urged in the Fisher trial were the subject of a hearing in the action commenced by himself (No. 17745), in which action the Court branded his evidence as without credence. It thus appears that every opportunity was given Tesseyman to present in their fullness any claims which he had, and that he did so, and that the Courts in the two hearings refused to believe his testimony. Yet, in his brief, he constantly speaks of "collusion and connivance" (p. 13), of coming into Court with "unclean hands" (p. 27), as "insidious decree, no less evil than wicked" (p. 28), and these epithets are hurled at his co-defendants and their counsel, because they took an adverse position to him in open Court, and refused to repudiate the solemn agreement which the Nash Building Company had signed. Tesseyman forgets that he sued these same co-defendants for fraud in Action No. 17745, asking damages in the sum of $50,000 (Tr. p. 41-43). He forgets that in Action No. 17745, in which Tesseyman claimed a trade instead of a sale, and in which he sought to repudiate the escrow instructions, that that action was subsequently tried and decided adversely to him, and that the Appellate Court (113 CA 2d 405) definitely stamped the escrow agreements as valid contracts and that Tesseyman's claim to the contrary was unsupported. At 113 CA 2d 404 at 407, the Court said:

> "Notwithstanding plaintiff's disregard of the rules, we have examined the record. It would serve no useful purpose to recite the many ramifications of the transactions involved. Suffice it

to say that documentary evidence bearing plaintiff's signature and the oral testimony clearly and unequivocally support the court's findings."

If the escrow instructions honestly evidenced the true transaction, could Tesseyman's co-defendants join with him in his effort to swindle Fisher out of the balance of his purchase money by disavowing and repudiating, not only their own solemn written promises, but the signature of Tesseyman which appeared on the same document. If the escrow instructions were honest documents and clearly evidenced the transaction, was there any more honorable course which could be pursued than to admit the debt and by permitting a default to be entered in an action to which they had no legitimate or honest defense?

This is the extrinsic fraud which Tesseyman claims bestows jurisdiction on this Court to entertain this motion for intervention.

The application of the doctrine of the *Throckmorton* case has been applied to petitions for intervention under Rule 24. *Dowdy v. Hoffield,* 189 Fed. 637 is directly in point except that it involved probate orders rather than judgments. It appeared that in the Probate Court in the District of Columbia, various efforts had been made by the attempted intervener to have the will set aside on the ground of fraud and undue influence. He had a trial and an appeal, both of which were decided adversely. Nevertheless, he attempted to accomplish the same result through the medium of intervention. The Circuit Court of Appeals said:

". . . The Supreme Court in United States v. Throckmorton, 1878, 98 U.S. 61, 25 L.Ed. 93, held that the fraud must be 'extrinsic or collateral, to the matter tried by the first Court, and not to a fraud in the matter on which the decree was rendered'. Josserand v. Taylor, 1946, 159 F. 2d 249, 34 C.C.P.A., Patents, 824, affirmed this rule and in that case the Hazel-Atlas Glass Co. v. Hartford-Empire Co. case, 1944, 322 U.S. 238, 64 S. Ct. 997, 88 L.Ed. 1250, was held not to have changed the law."

"[4, 5]. The appellants in Case No. 10, 475 contend that they should have been allowed to intervene as a matter of right or at least that it was an abuse of discretion to deny them leave to intervene. The law is well settled that one entitled to intervene as a matter of right under Rule 24(a) (3), F.R.C.P. 'must have an interest in the subject matter of the litigation of such a nature that he will gain or lose by the direct legal operation of the judgment'. Pure Oil Co. v. Ross, 7 Cir., 1948, 170 F. 2d 651, 653. *Such is not the case here. The appellants' interest in the estate was determined to be nothing in the former contest of the issues which are also presented in this case.*" (Italics ours.)

Exactly the same situation exists in the present action. Trials were had by Courts which had jurisdiction of the subject matter and the parties, and adverse decisions were rendered to the present intervener which decisions were affirmed in written opinions by the District Court of Appeal of California. There was no extrinsic fraud which prevented an adverse trial, and as was said in the *Dowdy* case, the

appellant's interest in the estate was determined to be nothing in the former contest of the issues, which are also presented in this case. Tesseyman's (the appellant here) interest in the estate was likewise determined to be nothing in a former contest of the issues, which he again attempts to present in this case.

PART III.

THE REFUSAL OF THE UNITED STATES DISTRICT JUDGE TO ALLOW INTERVENTION WAS PROPER AND WAS NOT AN ABUSE OF DISCRETION.

The interpretation of Rule 24 of the Federal Rules of Procedure has been the subject of judicial decisions.

In *Mullins v. DeSoto Securities Co.,* 2 FRD 502, the Court in discussing Rule 24 (a), which pertains to intervention as a matter of right, it is stated that the Courts are unanimous in requiring prompt action on the part of an intervener who seeks to assert rights in a suit to which he is not a party, and that he must make timely application, and the question in each case is determined by the exercise of sound discretion by the trial Court, and in discussing Rule 24 (b) with respect to permissive intervention likewise stated it lies within the discretion of the district judge and can be reversed only for abuse.

In *In re Rumsey Mfg. Corp.,* 7 FRD 93, the Court, referring to both Rules 24 (a) and (b), says in determining whether or not the application is timely, it must

be made to appear why the application was not made within a reasonable time after the commencement of the action.

In *United National Bank of Youngstown v. Superior Steel,* 9 FRD 124, the Court said at 127, that intervention will not normally be allowed once the actual trial has begun or is about to begin.

In *Durkin v. Pet Milk,* 14 FRD 364, the Court went extensively into the question of intervention under Rule 24 and in discussing permissive intervention points out that if the intervention would materially delay or prejudice the original action it should be denied.

In *In re Willecy County Water Control and Improvement District,* 36 Fed. Sup. 36, the Court states that the permissive intervention lies in the judicial discretion of the trial Court, and that when the claim or defense departs from the field of litigation of the original parties in such a manner as to complicate or delay its determination, leave should be denied.

The District Court rendered a judgment against the government in Fisher's suit and the government appealed. There is on file in the government's appeal a reporter's transcript of the evidence. This Court can take judicial notice of the facts which appear therein. (*Booth v. Fletcher,* 101 Fed. 2d 676 f.n. at 679.) It appears from the transcript that Tesseyman was called as a witness by the government on March 1, 1954 (Tr. p. 15-23). He therefore knew on March 1, 1954 of the pendency of the litigation and

must have known some considerable time prior thereto in order to be present as a witness. On this date the testimony was closed and the matter submitted on briefs to be filed by the government and by Fisher. Tesseyman did not file his motion for intervention until the 17th day of March, 1954 and its hearing was set for March 29, 1954, at which time it was denied. It thus appears that Tesseyman's motion was made after the closing of the testimony and all that was left to be done was the filing of briefs. If Tesseyman had been permitted to intervene at this late date, it must be made to appear why the application was not made within a reasonable time after the commencement of the action, and why it was not made until after all the testimony had been taken. Furthermore, it clearly appears that if the intervention had been granted a field of litigation would have been opened up, which was foreign to the issues between Fisher and the government, and would have complicated and delayed the determination of the validity of the government's tax lien. It would have required a retrial of the cases tried in the Superior Court accompanied by voluminous testimony.

CONCLUSION.

It thus appears:

1. That the judgments of the state Courts are valid and final and are not subject to either a collateral or a direct attack on the ground of extrinsic fraud, and therefore Tesseyman had no right, estate,

interest or claim in or to the real property involved for the reason that by the State Court actions it has been adjudged that he had no interest in the property and therefore the motion for intervention was properly denied, and

2. That the motion for intervention was not timely for the reason that it was filed after the trial had begun, the taking of evidence was closed and it would have injected new issues into the trial which would depart from the field of litigation of the original parties, and the hearing of such issues would have complicated and delayed the determination of the tax lien question which was pending between Fisher and the government, with the result that the application to intervene was properly denied because it was not timely. Furthermore, the question of whether the application was timely or untimely lies in the sound discretion of the trial judge, and there is not the slightest suggestion that he in any way abused his discretion.

We respectfully submit that the action of the trial judge should be affirmed.

Dated, San Francisco, California,
February 14, 1955.

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